Abdullah Sani bin Jaafar (suing as administrator of the estate of the late Datuk Jaafar bin Hussain, deceased, and on behalf of himself as beneficiary) v Mohamad bin Bakar & Anor

HIGH COURT (TAWAU) — ORIGINATING SUMMONS NO T(24) 7 OF 1997
IAN CHIN J
27 JUNE 1997

Islamic Law *— Jurisdiction — Syariah court — Whether Syariah court has jurisdiction over a claim by the estate of a Muslim for a refund of the debt sum which was paid to the defendant pursuant to an order of the native court — Syariah Court Enactment 1992 (Sabah) s 10(2)(b)(viii) & (ix)*

Civil Procedure *— Jurisdiction of the court — Syariah court — Whether Syariah court has jurisdiction over a claim by the estate of a Muslim for a refund of the debt sum which was paid to the defendant pursuant to an order of the native court — Syariah Court Enactment 1992 (Sabah) s 10(2)(b)(viii) & (ix)*

The plaintiff had applied for an order for the distribution of the estate of the deceased. As the deceased was a native, the application was referred to the Tawau Native Court ('the native court'). The first defendant subsequently applied to the native court for an order that a sum of RM88,052.50 ('the debt sum') in the deceased's account with the second defendant be paid to him being money allegedly owed by the deceased to him.

The native court ruled that the first defendant was entitled to the debt sum and ordered the debt sum to be paid out of the account with the second defendant. Pursuant to that, the first defendant withdrew the money from the account. Consequently, the plaintiff took out a summons in the sessions court against the two defendants and claimed, inter alia, a declaration that the first defendant received the debt sum without proper authority or fraudulently from the account and a declaration that the second defendant had no legal authority to release the sum. The sessions court dismissed the summons on the ground that it had no jurisdiction to grant the declarations.

Before the High Court, counsel for the first defendant submitted that the High Court has no jurisdiction over the matter and that only the Syariah court established under the Syariah Court Enactment 1992 (Sabah) ('the Sabah Enactment') has jurisdiction. The first defendant relied on, inter alia, s 10(2)(b)(viii) and (ix) as being the relevant provisions vesting the Syariah court with jurisdiction over the matter. The issue was whether the Syariah court has jurisdiction over the cause of action instituted in the High Court by the plaintiff which, in substance, was a claim by the estate of a Muslim for a refund of the debt sum from the defendants which sum was obtained

by the first defendant from the second defendant pursuant to an order of the native court. A

Held, dismissing the application with costs:

Jurisdiction is conferred on the Syariah court in Sabah by s 10(2) of the Sabah Enactment. The words 'division of and inheritance of property, testate or intestate' in s 10(2)(b)(viii) of the Sabah Enactment connote matters relating to the division, receiving and derivation of property by legal descent or succession and genetically from one's ancestors. Those words do not encompass a creditor of the estate of the deceased who is not claiming for an inheritance through genetic descent but only for a debt due from the estate of a deceased. Therefore, a claim by a creditor against the estate of a deceased does not come within the ambit of s 10(2)(b)(viii). B C

Such a claim also does not come within the words of s 10(2)(b)(ix) — 'determination of persons entitled to part of the estate of a Muslim deceased or part thereof which such persons are entitled to respectively' — because a creditor cannot be regarded as a person being entitled to a part of the estate of a deceased Muslim since a creditor is not claiming inheritance genetically from his ancestors as the deceased is not his ancestor. The claim of a creditor is also not directly related but merely incidental to the distribution of the estate of the deceased, having arisen out of a business transaction rather than through the incidence of birth though both involve the estate of the deceased. Therefore, neither s 10(2)(b)(viii) nor s 10(2)(b)(ix) confers jurisdiction on the Syariah court to determine the claim of a creditor against the estate of a deceased for a debt. This being the case, the High Court would have jurisdiction over the matter (see pp 486A and 487B–E); *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 followed. D E F

[Bahasa Malaysia summary

Plaintif telah memohon untuk satu perintah bagi pembahagian harta pusaka si mati. Oleh kerana si mati adalah orang asli, permohonan itu dirujuk kepada Mahkamah Adat Tawau ('mahkamah adat'). Defendan pertama kemudiannya memohon kepada mahkamah adat untuk satu perintah bahawa sejumlah RM88,052.50 ('jumlah hutang tersebut') dalam akaun si mati dengan defendan kedua dibayar kepadanya yang merupakan wang yang dikatakan dihutang oleh si mati daripadanya. G H

Mahkamah adat memutuskan bahawa defendan pertama adalah berhak kepada jumlah hutang tersebut dan memerintahkan jumlah hutang tersebut dibayar daripada akaun dengan defendan kedua. Ekoran daripada itu, defendan pertama mengeluarkan wang daripada akaun itu. Oleh sebab itu, plaintif mengeluarkan saman di mahkamah sesyen terhadap dua defendan itu dan menuntut, antara lain, satu deklarasi bahawa defendan pertama menerima jumlah hutang tersebut I

tanpa kuasa yang wajar atau secara fraud daripada akaun itu dan satu deklarasi bahawa defendan kedua tidak mempunyai kuasa di sisi undang-undang untuk melepaskan jumlah itu. Mahkamah sesyen menolak saman itu atas alasan bahawa ia tidak mempunyai bidang kuasa untuk memberikan deklarasi-deklarasi itu.

Di Mahkamah Tinggi, peguam bagi pihak defendan pertama menghujahkan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa ke atas perkara itu dan bahawa hanya mahkamah Syariah yang ditubuhkan di bawah Enakmen Mahkamah Syariah 1992 (Sabah) ('Enakmen Sabah') mempunyai bidang kuasa. Defendan pertama bergantung kepada, antara lain, s 10(2)(b)(viii) dan (ix) sebagai peruntukan yang relevan yang meletakhak kepada mahkamah Syariah bidang kuasa ke atas perkara itu. Isu adalah sama ada mahkamah Syariah mempunyai bidang kuasa ke atas kausa tindakan yang dimulakan di Mahkamah Tinggi oleh plaintif yang mana, pada amnya, adalah satu tuntutan oleh harta pusaka seorang muslim untuk pengembalian jumlah hutang tersebut daripada defendan-defendan yang mana jumlah itu diperolehi oleh defendan pertama daripada defendan kedua ekoran daripada perintah mahkamah adat.

Diputuskan, menolak permohonan dengan kos:

Bidang kuasa dikurniakan kepada mahkamah Syariah di Sabah oleh s 10(2) Enakmen Sabah. Perkataan-perkataan 'pembahagian dan pewarisan harta, dengan wasiat atau tanpa wasiat' dalam s 10(2)(viii) Enakmen Sabah membawa konotasi perkara-perkara yang berkaitan dengan pembahagian, penerimaan dan pemerolehan harta oleh keturunan atau pewaris di sisi undang-undang dan secara genetik daripada nenek moyang seseorang. Perkataan-perkataan itu tidak merangkumi pemiutang harta pusaka si mati yang tidak menuntut pewarisan melalui keturunan genetik tetapi hanya untuk hutang yang perlu dijelaskan daripada harta pusaka si mati. Oleh itu, satu tuntutan oleh pemiutang terhadap harta pusaka si mati tidak termasuk dalam lingkungan s 10(2)(b)(viii).

Tuntutan yang sedemikian juga tidak termasuk dalam perkataan-perkataan s 10(2)(b)(ix) — 'penentuan orang yang berhak kepada bahagian harta pusaka si mati Muslim atau sebahagian daripadanya yang orang sedemikian masing-masing berhak' — kerana pemiutang tidak boleh dianggap sebagai orang yang berhak kepada sebahagian harta pusaka si mati Muslim kerana pemiutang tidak menuntut pewarisan secara genetik daripada nenek moyangnya kerana si mati bukan nenek moyangnya. Tuntutan pemiutang juga tidak berkait secara terus tetapi hanya secara sampingan kepada pembahagian harta pusaka si mati, yang timbul daripada transaksi perniagaan bukannya daripada melalui insidens kelahiran walaupun kedua-duanya melibatkan harta pusaka si mati. Oleh itu, s 10(2)(b)(viii) atau s 10(2)(b)(ix) tidak mengurniakan bidang kuasa ke atas mahkamah Syariah untuk menentukan tuntutan pemiutang terhadap harta pusaka

si mati untuk hutang. Oleh itu, Mahkamah Tinggi mempunyai bidang kuasa ke atas perkara itu (lihat ms 486A dan 487B–E); *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 diikut.]

Notes

For cases on the jurisdiction of the Syariah court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 384–391 and 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2258.

Cases referred to

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)

Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (folld)

Legislation referred to

Administration of Muslim Law Enactment 1959 (Penang) ss 2, 40
Administration of Native and Small Estates Ordinance s 3
Federal Constitution art 121(1A)
Syariah Court Enactment 1992 (Sabah) ss 10(2), 10(2)(b)(viii), (ix), 14

Raymond Szetu (*Szetu & Associates*) for the plaintiff.
Abdul Razak Jamil (*Ansari & Co*) for the first defendant.
Hassan bin Murtaza (*Shelley Yap Leong Chong Tseu Chia*) for the second defendant.

Cur Adv Vult

Ian Chin J:

Introduction

In this action, Abdullah Sani bin Jaafar (suing as administrator of the estate of Datuk Jaafar bin Hussain, deceased, and as beneficiary) ('the plaintiff') claims against Mohamad bin Bakar ('the first defendant') and Amanah Saham Nasional Bhd ('the second defendant') for:

(i) a declaration that the ruling of the Tawau Native Court made on 3 April 1995 in Case No Mant 62/MR 94 on the distribution of the cash of the estate of the said deceased which was in the hands of the second defendant is null and void;

(ii) a declaration that the first defendant is not entitled to receive and the second defendant has no authority to pay to the first defendant the sum of RM88,052.50 on or about 13 July 1995; and

(iii) an order that the first and second defendants repay the plaintiff the sum of RM88,052.50 with interest at the rate of 8% from 13 July 1995 until final payment.

A The first defendant applied to have the action struck out, which I will deal with after adverting to the undisputed facts of the case.

Facts of the case

The deceased had carried on business under the style of Jimha Sendirian
B (Jaafar Contractor) and at the date of his death, he had RM113,783.30 to his credit in the account with the second defendant. On 27 July 1994, the plaintiff applied for an order for the distribution of the estate of the deceased under s 3 of the Administration of Native and Small Estates Ordinance. The deceased being a native, pursuant to s 20 of the Ordinance,
C the application was referred to the Tawau Native Court. The first defendant then sometime in October 1994 applied to the Tawau Native Court for an order that a sum of RM88,052.50 be paid to him (trading as Sykt Sajimo Enterprise) being money allegedly owed by the deceased to him which claim was disputed and queried by the plaintiff's solicitors to which the
D first defendant did not respond. The Tawau Native Court heard the application on 30 March and on 3 April, ruled that the first defendant was entitled to the sum and ordered the sum to be paid out of the account with the second defendant after considering the evidence adduced before it. The plaintiff then filed an appeal to the Native Court of Appeal against the decision of the Tawau Native Court, which appeal is still pending. However,
E the first defendant procured a letter dated 25 May from the Sandakan Native Court to authorize him to withdraw the money from the said account and the said sum was withdrawn on 13 July. On 18 June 1996, the plaintiff took out a summons in the Kota Kinabalu Sessions Court against the said two defendants and against Awang Ram bin Hj Yousop. This
F action claimed a declaration that the first defendant received the sum of RM88,052.50 without proper authority or fraudulently from the said account, a declaration that the second defendant had no legal authority to release the said sum and that the letter issued by Awang Ram bin Hj Yousop did not constitute valid or proper authority to release the said
G sum. The summons was dismissed on 26 April 1997 by the sessions court because it was of the view that it had no jurisdiction to grant the declarations. Before that date, the plaintiff had taken out the present action in the High Court on 31 January 1997. I turn now to the contentions regarding the striking out.

H *Whether the High Court has jurisdiction*

Mr Abdul Razak Jamil, learned counsel for the first defendant had submitted to the effect — though not in like words — that the High Court has no jurisdiction over the matter and that only the Syariah court established
I under the Syariah Court Enactment 1992 has jurisdiction. Learned counsel cited in support of that proposition of law *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793. In that case, the husband and wife were Muslims and the wife had petitioned the Syariah court for a divorce. She then took out a writ in the High Court, claiming damages for assault and battery and for an injunction against such acts by the husband

(and others). She thereafter took out a summons for an interlocutory injunction, which was disposed of when the husband gave an undertaking he would not do such acts and the matter was then adjourned sine die. The wife alleged that there was further harassment by the husband and the summons was then restored for hearing and an ex parte injunction granted. The husband then made an application to set aside the injunction and the writ and statement of claim on the ground of the want of jurisdiction. The (then) Supreme Court held that art 121(1A) of the Federal Constitution had taken away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah courts and that assault and battery were covered by s 127 of the Islamic Family Act 1984 and the Syariah court, therefore, had the jurisdiction and power to grant an injunction under s 107 of the Act. The Supreme Court had also held that once the parties had submitted themselves to the jurisdiction of the Syariah court and that once the Syariah court had taken cognizance of the matrimonial cause (because the acts complained of constituted a matrimonial offence or misconduct under s 127 of the Selangor Islamic Family Law Enactment 1984 and of the Islamic Family Law (Federal Territory) Act 1984 on the ground of the husband's misconduct), it was an abuse of process for the wife to go to the High Court. It was said by the Supreme Court (at p 806) that the approach to be taken when faced with the issue of jurisdiction is to examine whether the action of the husband falls within the jurisdiction of the Syariah court; and that if it does, the High Court shall by virtue of art 121(1A) have no jurisdiction. Another case relied on by learned counsel was *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, the facts of which are these. A mother had applied for a declaration that the deceased son was not a Muslim or had renounced the Islamic faith and she claimed the body of the son. The deceased was born a Sikh but was later converted to Islam on 1 June 1991 before the Kulim District Kadi which conversion was registered in accordance with s 139 of the Administration of Muslim Law Enactment 1962 of Kedah. He was engaged to marry a Muslim girl on 25 November 1991. Before that date, the deceased had by a deed poll on 9 September renounced the Islamic faith and resumed the Sikh faith practice. The High Court had held that the deceased was a Muslim after rejecting the evidence regarding the resumption by the deceased of the Sikh faith. On appeal, the Supreme Court directed that certain questions of Islamic law be referred to the Kedah Fatwa Committee which decided that the deceased was a Muslim as he had been duly converted and there was no decision of a Syariah court to say that he had renounced or left the Islamic faith. The High Court after receiving the fatwa confirmed his earlier findings and decision against which decision the mother appealed. The Supreme Court then held that the High Court was entitled to accept the answers of the fatwa committee, and that the High Court was correct in its finding of facts. However, Mohd Yusof SCJ was of the view that it was not 'feasible' to direct the High Court to refer the matter to the fatwa committee as the Syariah court was the only forum qualified to answer the question of whether the deceased had renounced Islam during his lifetime. The facts

of the two cases are different from that of the present case but it is common ground that cl (1A) of art 121 of the Federal Constitution had taken away the jurisdiction of civil courts in respect of matters within the jurisdiction of the Syariah courts.

Thus, it has to be determined whether the Syariah court has jurisdiction over the cause of action instituted in the High Court by the plaintiff which, in substance, is a claim by the estate of a Muslim for a refund of the sum of RM88,052.50 from the defendants which sum was obtained by the first defendant from the second defendant pursuant to an order of the native court. The plaintiff's claim arose as a result of the claim by the first defendant against the deceased for a debt which the native court had ruled in favour of the first defendant. The case of *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 provides a very good illustration on how to approach the issue. In that case, the plaintiff, the former wife of the first defendant, claimed that 47,001 units of Amanah Saham shares ('the shares') issued by the second defendant, Amanah Saham Nasional Sdn Bhd, although registered in the first defendant's name were held in trust for her and sought an injunction and an order for transfer of the shares in her favour. The plaintiff alleged that she had purchased the shares at the instance of the first defendant and a resulting trust in her favour arose. The plaintiff had been granted an interlocutory injunction. The first defendant alleged that the shares were a gift and applied to: (i) strike out the plaintiff's claim on the grounds that it disclosed no reasonable cause of action, was frivolous, vexatious and misconceived in law and an abuse of the process of court; and (ii) set aside the interlocutory injunction on the grounds that there was no serious question to be tried, there had been non-disclosure of material facts, damages were an adequate compensation and the balance of convenience favoured the first defendant rather than the plaintiff. The first defendant raised a preliminary objection that by virtue of art 121(1A) of the Federal Constitution, the High Court had no jurisdiction to hear the matter as the Syariah courts had exclusive jurisdiction over the issues arising in the suit. Both parties were Muslims and that the sum of RM47,000 applied towards the purchase of the shares was derived from compensation money amounting to RM105,000 paid by the Penang Adventist Hospital, George Town in settlement of all claims arising from a suit for professional negligence brought by the plaintiff against it and that sum of RM47,000 was handed over by the plaintiff to the first defendant during the subsistence of the marriage although the action herein was commenced some three months after the divorce. The state enactment that was alleged to have conferred jurisdiction on the Syariah court is the Penang's Administration of Muslim Law Enactment 1959 ('the Penang Enactment') which s 40 is in the following terms:

> ... the Court of the Kathi Besar shall have jurisdiction throughout the State ... .
>
> (3) The Court of the Kathi Besar shall —

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess the Muslim Religion and which relate to:
(i) betrothal, marriage, divorce, nullity of marriage, judicial separation or nushuz;
(ii) any disposition of, or claim to property arising out of any of the matters set out in sub-paragraph (1) of this paragraph;
(iii) ...
(iv) division inter vivos of sa-pencarian property;
(v) ...
(vi) other matters in respect of which jurisdiction is conferred by any written law.

'Sa-pencarian property' referred to above is defined under s 2 as property acquired by a husband and wife during the continuance of the marriage. The Penang Enactment also gives powers to the Syariah court to make interim orders for the purpose of preserving any property in issue, or safeguarding the rights of any party, pending trial, or facilitating the trial or hearing of the proceedings. On the other hand, counsel for the plaintiff has contended that this court has jurisdiction to entertain the present suit notwithstanding art 121(1A) of the Federal Constitution because the plaintiff's claim to the shares does not touch on matters relating to claims of property arising out of marriage or divorce and so the Syariah courts have no jurisdiction to entertain this suit. In the course of his judgment, Edgar Joseph Jr SCJ (now FCJ) said this (at pp 162–163):

> The first point which calls for consideration is what is the meaning to be ascribed to the words 'all actions and proceedings in which all the parties profess the Muslim Religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation or nushuz' in the context of s 40(3)(b)(i)?
>
> It appears to me that the intention of the legislature in enacting s 40(3) was to restrict the jurisdiction of the court of the kathi only to actions and proceedings of the sort specified thereunder.
>
> The long title is the first of the elements of an Act of Parliament that can be used to find the meaning of the Act and particularly as 'a guide to the purpose' of the Act (*Lambe v Director-General of Social Services* (1981) 57 FLR 262 at pp 268–269). However, unless the particular section of the Act that is under consideration is one that can have two or more different meanings, the long title must not be used to find its meaning. If, therefore, the meaning of the section is clear, it cannot be altered by reading the long title (*Sage v Eicholz* [1919] 2 KB 171). This does not mean that the long title may not be used to reinforce the meaning of the section where it is clear. Here, the long title to the Enactment provides, inter alia, 'An Enactment to make provisions for regulating Muslim religious affairs ...'. Clearly, the plaintiff's claim being based on the presumption of a resulting trust, has nothing to do with Muslim religious affairs.
>
> The next point which calls for consideration is the meaning of the words 'which relate to'. The *Concise Oxford Dictionary* (6th Ed) defines the word 'relate' as, inter alia, 'have reference to'. It is true, as Lord Coleridge said in *R v Peters* (1886) 16 QBD 636 (at p 641):

A I am quite aware that dictionaries are not to be taken as authoritative exponents of the meaning of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books.

B In my view, having regard to the context and purpose of s 40(3)(b)(i), (ii) and (iii) as I understand it, in order to bring an action or proceeding within its purview, 'marriage or divorce' or claims 'to property arising out of marriage or divorce' must be directly, and not merely incidentally or remotely, involved. In other words, the marriage or divorce must have a dominant and immediate connection with the action or proceeding.

C Applying this test, 1 fail to see how it could be said that the plaintiff's action relates to 'marriage or divorce' or 'any disposition of or claim to property arising out of marriage or divorce'.

As for the question whether the plaintiff's action relates to 'division inter vivos of sa-pencarian property' within the meaning of s 40(3)(b)(iv), it is important to note the definition of 'sa-pencarian property' appearing in D s 2 of the Enactment; it provides: 'property acquired by a husband and wife during the continuance of marriage'.

It is also helpful to refer to the following passage in the judgment of Briggs J in *Hujah Lijah bte Jamal v Fatimah bte Mat Diah* [1950] MLJ 63 where the expression 'harta sa-pencharian' was considered (at p 63):

E 'The phrase harta sa-pencharian I understand to mean "acquired property", with the specialized meaning in this context of "property acquired during the subsistence of their marriage by a husband and wife out of their joint resources or by their joint efforts". The "acquisition" referred to may extend to cover mere enhancement of value by reason of cultivation or development. The phrases "harta F sharikat" and "harta charian laki bini" appear to be synonymous with "harta sa-pencharian" in this context.'

Applying this text, I fail to see how it could be said that the plaintiff's action relates to 'division inter vivos, of sa-pencharian property' regard being had to the fact that it is common ground that the subject matter of this action is 47,001 units of shares which had been purchased with money provided G exclusively by the plaintiff, and represented part of the compensation she had received from the Penang Adventist Hospital in settlement of her claims in the suit she had brought against it for professional negligence. There is no question, therefore, of the purchase price or any part of it, having been raised or acquired out of joint resources or joint efforts of the plaintiff and the first defendant.

H For the reasons stated, the plaintiff's action does not, so far as I can see, relate to 'marriage or divorce', or 'any disposition of or claim to property arising out of marriage or divorce' or 'division inter vivos of sa-pencarian property', within the meaning of s 40(3)(b)(i), (ii) and (iv) of the Enactment. Furthermore, the claim for injunctive relief is not, as the first defendant submits, ancillary to the divorce, but merely consequential to the primary I relief sought, which is for a declaration as to ownership of the shares.

Accordingly, I would dismiss the preliminary objection as to jurisdiction based on art 121(1A) of the Federal Constitution.

The enactment that calls for consideration in the present case is the Syariah Court Enactment 1992 (Sabah) ('the Sabah Enactment') where jurisdiction is conferred on the Syariah court by s 10(2) in the following terms:

> (2) The Syariah Court shall —
>
> (a) in criminal jurisdiction, try any offence committed by a Muslim and punishable under Administration of Muslim Law Enactment 1992, any law creating Syariah criminal offences, Islamic Family Law Enactment 1992, or under any other written law which confers jurisdiction on the Syariah High Court to try any offence, and may impose any punishment provided therein; and
>
> (b) in its civil jurisdiction, hear and decide all actions and the proceedings in which all parties are Muslims and which relate to —
>
> (i) bethrothal, marriage, divorce, *fasakh*, or *faraq*;
>
> (ii) any disposition of, or claim to property arising out of any matter set out in sub-paragraph (i) of this paragraph;
>
> (iii) maintenance of dependants, legitimacy, or guardianship or custody (*hadanah*) of infants;
>
> (iv) division or claim to *harta sepencarian*;
>
> (v) wills or gifts during *maradal-maut* of a Muslim deceased;
>
> (vi) gift *inter vivos* (hibah), or settlement made without adequate monetary consideration or value, by a Muslim;
>
> (vii) *wakaf* or *mazr*;
>
> (viii) division of and inheritance of property, testate or intestate;
>
> (ix) determination of persons entitled to part of the estate of a Muslim deceased or part thereof which such persons are entitled to respectively; or
>
> (x) other matters in respect of which jurisdiction is conferred by any written law.

A lower court is also conferred the same type of jurisdiction save that criminal punishment shall not exceed the fine of RM3,000 or imprisonment of more than three years and the value of the subject matter in civil jurisdiction is limited to RM300,000 or 'is not capable of estimation in terms of money', which I have set out earlier. The first defendant relied on s 10(2)(b)(viii) and (ix) of the Sabah Enactment as being relevant apart from s 14, which says:

> 14 Where in the process of any proceedings relating to administration or division of estate of a deceased Muslim, any court or authority, other than Syariah High Court or a Syariah Lower Court, is under an obligation to decide on the rightful person to any share in such estate, or any part thereof to which such person is entitled, the Syariah Court may, on request by such court or the authority, or on application by any person claiming to be beneficiary or his representative and after payment of the prescribed fee, certify the facts according to its opinion as to the persons who are entitled to share in the estate as to the proportions or parts in which they are so entitled respectively.

Section 14 is obviously irrelevant to the present case because this case is not concerned with a claim by a beneficiary. As for the Sabah Enactment it is, in my view, in substance similar to the Penang Enactment. That being the case, I would respectfully adopt the approach as that of *Noor Jahan bte*

Abdul Wahab v Md Yusoff bin Amanshah & Anor in resolving the dispute in this case. My first task would be that of ascertaining the meaning of the words in s 10(2)(b)(viii), 'division of and inheritance of property, testate or intestate'. Read as a whole phrase, they connote matters relating to the division, receiving and derivation of property by legal descent or succession and genetically from one's ancestors. Those words do not encompass a creditor of the estate of the deceased who is not claiming for an inheritance through genetic descent but only for a debt due from the estate of a deceased. Therefore, a claim by a creditor against the estate of a deceased does not come within the ambit of s 10(2)(b)(viii). Such a claim also does not come within the words of s 10(2)(b)(ix) — 'determination of persons entitled to part of the estate of a Muslim deceased or part thereof which such persons are entitled to respectively' — because a creditor cannot be regarded as a person being entitled to a part of the estate of a deceased Muslim since a creditor is not claiming inheritance genetically from his ancestors as the deceased is not his ancestor. The claim of a creditor is also, to borrow the words of *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor*, not directly related but merely incidental to the distribution of the estate of the deceased, having arisen out of a business transaction rather than through the incidence of birth though both involve the estate of the deceased. Therefore, it is my view that neither s 10(2)(b)(viii) nor s 10(2)(b)(ix) confers jurisdiction on the Syariah court to determine the claim of a creditor against the estate of a deceased for a debt.

If the interpretation is otherwise, it would mean that all claims by one Muslim against another for a debt cannot be filed in the civil court. I do not think such a result was intended by Parliament.

The application for striking out the claim therefore fails. There is one other matter which I would have addressed myself, which is the fact that there is an appeal against the decision of the native court that is pending in the Native Court of Appeal. I would have considered, if it was urged, whether the said appeal renders the present action by the plaintiff an abuse of the process of the court which should at least entail a stay order. However, this point was not pursued by the defendants and I do not think it right that I should go into it.

Conclusion

In the premise, I dismiss the application of the first defendant with costs to the plaintiff.

Application dismissed.

Reported by Loo Lai Mee